

NTSB Order No. EA-3987

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 24th day of September, 1993

Docket SE-11765

The Administrator appeals from an order issued by Administrative Law Judge Jerrell R. Davis on December 9, 1991.¹ By that order, the law judge granted respondent's motion to dismiss the complaint and terminated the proceedings in this matter. The Administrator asserts on appeal that the law judge erred in dismissing the complaint. Respondent has filed a brief

6134

in reply, urging the Board to affirm the law judge's order. For the reasons that follow, we deny the appeal.

The record reveals that on June 21, 1989, an inspector with the Federal Aviation Administration (FAA) conducted an inspection of civil aircraft N908L and determined that certain maintenance performed by respondent on January 12, 1989, may not have been performed in accordance with a Service Bulletin which had been issued by the aircraft's manufacturer. An investigation was conducted, and on October 5, 1989, a Notice of Proposed Certificate Action (NOPCA) was issued to respondent. An order suspending respondent's mechanic certificate with airframe and powerplant ("A&P") rating was issued on March 6, 1991. During the interim period, respondent's employer, Aeron International Airlines, Inc., ceased doing business.

Because the NOPCA was issued approximately 9 months after the alleged violation and approximately 3 1/2 months after the FAA had knowledge of the alleged violation, respondent moved for dismissal under the Board's stale complaint rule, 49 C.F.R. section 821.33.² Respondent claimed that he had been prejudiced

²Rule 33 provides in pertinent part as follows:

"§ 821.33 Motion to dismiss stale complaint.

Where the complaint states allegations of offenses which occurred more than 6 months prior to the Administrator's advising respondent as to reasons for proposed action under section 609 of the Act, respondent may move to dismiss such allegations pursuant to the following provisions:

(a) In those cases where a complaint does not allege lack of qualification of the certificate holder:

(1) The Administrator shall be required to show by answer filed within 15 days of service of the motion that good cause

by the Administrator's delay, since his only defense was dependent on his witnesses' memories of the condition of the aircraft on the day he performed the maintenance, and because he claimed that he was not certain he could locate all the necessary witnesses, since his employer was no longer in business.

In response to the motion to dismiss, the Administrator produced a chronology of events leading up to the issuance of the order. The chronology indicates that during the course of July 1989, the case was actively investigated. On August 1, 1989, three days after a response to the FAA's Letter of Investigation was received from respondent's attorney, the file was forwarded to Regional Headquarters from the Flight Standards District Office (FSDO). On August 11, 1989, enforcement action was recommended by the Regional Flight Standards Division. On August 14, 1989, the file was received by the legal office in the Southwest Region of the FAA. On October 5, 1989, the NOPCA was sent to respondent.

(..continued)

existed for the delay, or that the imposition of a sanction is warranted in the public interest, notwithstanding the delay or the reasons therefor.

(2) If the Administrator does not establish good cause for the delay or for imposition of a sanction notwithstanding the delay, the law judge shall dismiss the stale allegations and proceed to adjudicate only the remaining portion, if any, of the complaint.

(3) If the law judge wishes some clarification as to the Administrator's factual assertions of good cause, he shall obtain this from the Administrator in writing, with due service made upon the respondent, and proceed to an informal determination of the good cause issue without a hearing. A hearing to develop facts as to good cause shall be held only where the respondent raises an issue of fact in respect of the Administrator's good cause issue allegations...."

The Administrator further asserted in his response to the motion to dismiss that,

There were three investigations going on simultaneously with respect to the time periods involved herein. The same safety inspector was involved in the investigation and processing of all these cases. One related to Mr. John Tester, who signed off the inspection of this repair, and the others involved Aeron, the employing air carrier. The action against Mr. Tester resulted in a suspension of his certificate. The Aeron investigation ultimately resulted in two enforcement actions against the company and resulted in the revocation of their air carrier certificate.

Approximately 3 1/2 months was consumed in investigating the incident, interviewing potential witnesses, gathering data from Canadair, the manufacturer of the airplane, and processing the case through the Flight Standards Division and the Assistant Chief Counsel's office....

Contrary to the Administrator's assertion, we think that his delay is only partially justified by the documents contained in the Board's file in this proceeding. Although the investigative file, which was produced as an exhibit to respondent's motion to dismiss, shows that the case was investigated throughout the month of July, we find nothing which explains the delay in the processing of the case from August 14, 1989, when it was received in counsel's office, to October 5, 1989, when the NOPCA was issued. All of the witnesses had been interviewed and all of the documentary evidence appears to have been obtained before the file was forwarded by the FSDO to the region.

Moreover, the assertion by counsel that other enforcement actions were taken in related cases,³ without any further

³On May 30, 1990, Administrative Law Judge Mullins affirmed a 30-day suspension against the A&P certificate of respondent's supervisor.

explanation of how this may have actually hindered the prosecution of respondent's case, is not sufficient to excuse all of the delay. In Administrator v. Brea, NTSB Order No. EA-3657 (1992), we reaffirmed our view that where a violation is not discovered contemporaneously, the Administrator's belated awareness may only serve as good cause for a delay in the issuance of a NOPCA if reasonable prosecutorial diligence is exercised after the receipt of information concerning the acts which may be indicative of such a violation. "[T]he Administrator must show that such cases are processed with greater dispatch than they would otherwise receive" in order to avoid running afoul of Rule 33." Id. at 3-4, and cases cited therein.⁴ Thus, the Administrator was required in this case to demonstrate that the entire processing of this case was expedited, so as to minimize any further delay. Instead, he offers no good cause as to why the case was not expedited during the seven weeks it was in counsel's office. Since good cause has not been shown as to why the Administrator delayed in issuing the NOPCA, the complaint must be dismissed as stale.

⁴We concluded in Brea that the period of delay, almost identical to that here, from the issuance of the letter of investigation to the issuance of the NOPCA, and which was also not explained, established that the Administrator's processing of the case was less than expeditious and that the complaint was stale.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and
2. The law judge's order is affirmed and the Administrator's complaint is dismissed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.